

technical support. 85 FCC 2d at 714. In The Seven Hills Television Company, supra, the Review Board found no violation of Section 310 where the licensee and the network which was alleged to control it had the same President, and noted that the Commission had determined that special public interest benefits resulted from that relationship. 2 FCC Rcd at 6883. Similarly, when the Commission expanded the multiple ownership limits to encourage established broadcasters to engage in joint ventures with minorities, it determined that special public interest benefits result from allowing such broadcasters to hold cognizable interests -- including interests as officers and Directors -- in both their existing and the additional interests. Reconsideration of Multiple Ownership Rules, ¶596 supra; Attribution of Ownership Interests, ¶¶597-99 supra. Consequently, no violation of Section 310(d) results from Dr. Crouch's positions as President of TBN and NMTV.

639. Moreover, the fact that Dr. Crouch was President of NMTV and the bylaws setting forth the powers of NMTV's President were specifically before the Commission when it granted the Odessa application. (¶30 above.) Thus, that Dr. Crouch had the authority as NMTV's President to "generally supervise, direct, and control the business and the officers of the corporation" and "shall have the power to select and remove all agents and employees of the corporation" were part of the authority the Commission granted when it approved that application. As previously indicated, the exercise of existing de jure authority

does not violate Section 310(d). Turner Broadcasting System, Inc., ¶610 supra.<sup>100/</sup>

640. Likewise, under existing precedent, there is nothing improper about Mrs. Duff functioning as an active Director of NMTV while she is a key employee of TBN. In Southwest Texas Public Broadcasting, supra, the Commission found that no question of de facto control was raised by the fact that the licensee's President and General Manager was a key employee of the party that provided most of the licensee's financial and technical support and was paid directly by that party. 85 FCC 2d at 714. In The Seven Hills Broadcasting Company, supra, the Review Board held that no de facto control existed where the network which was alleged to control the licensee paid substantial compensation for services from the licensee's senior officer. 2 FCC Rcd at 6879-80. The Commission's specific policy concerning key employees permits a Director and officer of one licensee to remain a key employee of another licensee unless the relationships concern stations that are "in the same community or market," which is not the case here. Reexamination of the Commission's Cross-Interest Policy (Notice of Inquiry), supra, 2 FCC Rcd at 3699. See also, Fox Television Stations, Inc., 8 FCC Rcd 2361, 2398-400 (Rev. Bd. 1993) (Commission

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<sup>100/</sup> The record reflects that Dr. Crouch actually has had significantly less involvement in NMTV's business than the authority granted to him would permit, and has devoted less time to NMTV than he has to TBN's own affiliate stations. (¶33 above.)

policy regarding "key employees" pertains only to facilities that serve "substantially the same area").

641. The facts as well as the law show no violation concerning NMTV's Board. The conclusion that Dr. Crouch and TBN do not control, and did not intend to control, NMTV's Board is substantiated by clear evidence. First, if Dr. Crouch had planned to control NMTV, he undoubtedly would have sought the same provision protecting him from removal as President and Director that he included in the Bylaws of TBN and TBN's affiliates. (§§36-38 above.) Yet, while TBN was including such provisions in its own Bylaws, the Bylaws of Trinity Broadcasting of Oklahoma City, Inc., and the Bylaws of Trinity Broadcasting of Denver, Inc., on November 28, 1979; in the Bylaws of Trinity Broadcasting of Florida, Inc., on January 4, 1980; and in the Bylaws of Trinity Broadcasting of Indiana, Inc., on March 3, 1981; no consideration was given to including those same provisions in NMTV's Bylaws adopted on September 19, 1980. (§§34-39 above.) Rather, NMTV's Bylaws provide that a majority of the Directors can remove Dr. Crouch as President and Director without cause. (§35 above.)

642. The difference is plainly material. The Commission has specifically held that the power of removal is a significant indicator of control. Payne Communications, Inc., 1 FCC Rcd 1052, 1054-55 (Rev. Bd. 1986) (power of removal provides ability to control); Coastal Broadcasting Partners, 6 FCC Rcd 4242, 4253

(Rev. Bd. 1991) (to the same effect); WCVQ, Inc., 7 FCC Rcd 4849, 4852 (Rev. Bd. 1992), citing Coastal Broadcasting Partners, 7 FCC Rcd 1432, 1437, n. 8 (1992) (power to remove Directors without cause constitutes control). In fact, seven years after Dr. Crouch proceeded to diminish the control of other TBN Directors by foreclosing them from removing him absent an adjudication of cause by an independent body, the Commission ruled that restricting the removal power to that narrow context so negates the control of the restricted parties that limited partners will continue to be deemed passive and exempt from attribution as long as their right to remove the general partner is so restricted. Corporate Ownership Reporting and Disclosure of Broadcast Licensees, 1 FCC Rcd 802, 803 (1986). Yet, although he was fully aware of the control he could retain over NMTV by restricting the other Directors' removal rights, and had retained that control at TBN and TBN affiliates, Dr. Crouch did not seek that control at NMTV. (§139 above.) The significance of that omission is well recognized. Before he agreed to join NMTV's Board, Pastor Hill sought assurance from Mr. Juggert that the NMTV Board could terminate NMTV's joint venture with TBN when the Board decided to do so. (§155 above.) Mr. Juggert pointed out that NMTV's Bylaws allow the minorities who constitute a majority of NMTV's Board to make that decision and to remove Dr. Crouch from the Board. (§§135, 155 above.) Accordingly, the removal provisions of NMTV's Bylaws give the minor-

ities who are a majority of the Board of Directors control over Dr. Crouch, and not the other way around.

643. Moreover, there can be no legitimate question that, if Dr. Crouch or TBN intended to control and did control NMTV, NMTV would have built the low power station in Houston, Texas, that Dr. Crouch wanted to build to broadcast TBN programming and telethons. (§§47-53 above.) Contemporaneous evidence establishes that Dr. Crouch did not get his way. (§53 above.) There can be no legitimate question that, if Dr. Crouch or TBN intended to control and did control NMTV, NMTV would not have built the Odessa station that Dr. Crouch did not want to build, and TBN would not have financed that construction. (§§40-43 above.) Contemporaneous evidence establishes that Dr. Crouch did not get his way. (§§41-42 above.) There can be no legitimate question that, if Dr. Crouch or TBN intended to control and did control NMTV, NMTV would have listed the Odessa station for sale and made efforts to sell it in December 1988 when Dr. Crouch wanted to list it and sell it, and would not have spent months pursuing Mrs. Duff's futile efforts to obtain cable carriage. (§§44-46, 49, 75, 186 above.) Contemporaneous evidence establishes that Dr. Crouch did not get what he wanted when he wanted it. (§45 above.) There can be no legitimate question that, if Dr. Crouch or TBN intended to control and did control NMTV, NMTV would have authorized the amount that Dr. Crouch wanted to spend for the Portland studio, and not a penny or \$100,000 more, as actually happened. (§§109, 181, 214

above.) Contemporaneous evidence establishes that Dr. Crouch did not get his way. (Id.)

644. The record also demonstrates that NMTV has given the minorities who have served on its Board the opportunity to participate and have input into broadcasting in a way that they otherwise would not have had. Dr. Crouch, who is not a minority, candidly admitted that he understood the Commission's policy was intended to promote minority involvement in ownership and that, except for the general service that TBN's programming provides to all viewers, he was not personally focused on providing service specifically to minority populations or needs. (§177, n. 36 above.) Mrs. Duff also had the overriding goal to spread the gospel, but she also was more specifically cognizant than Dr. Crouch of the important role the church plays in the minority communities in promoting family values, racial harmony, guidance for the drug and alcohol addicted, feeding the homeless and poor, etc. (§177 above.) Moreover, Mrs. Duff also was interested in providing local programming service, outreach, and employment opportunities for minorities, as especially evidenced by her instructions to Mr. McClellan during his training and the manner in which he is carrying out those instructions under her supervision. (§§80-81 above.) And still further, Mrs. Duff brought to NMTV's Board a unique perspective that only a minority could bring about the taint which results and the embarrassment minorities feel when minority enterprises fail. (§§41, 46, 77, 166, n. 33 above.) Her pride and tenacity that

NMTV not be perceived as a failure were evidenced in her refusal to support Dr. Crouch's proposal to sell the Odessa construction permit (§41 above); her refusal to support his proposal to list the station for sale when she still thought it could generate sufficient revenues to fulfill her goals (§§46, 75 above); and her view that, by forgiving the Prime Time debt to save the Odessa station from financial ruin, NMTV enabled its initial venture to stay a success and not turn to failure. (§§77, 166, n. 33 above.) It is evident that Dr. Crouch or TBN alone could never have had these perspectives. Although most of Pastor Espinoza's tenure as a Director occurred when NMTV owned no stations, he conscientiously attended the Board meetings to participate in and learn about the industry. (§§96, 97 above.) Moreover, while his paramount goal also was to spread the gospel, he brought a special focus on the importance of that goal to the Hispanic people and the manner in which it addresses serious problems in the Hispanic community, such as family break-up, teen pregnancy, and alcohol and drug abuse. (§§90, 177 above.) He therefore expressed the view that the minorities in the Odessa area needed to hear the gospel preached to them (§45 above), a desire that is still being fulfilled through the decisions that NMTV has made concerning the Odessa station. It was Pastor Aguilar who articulated with precision why NMTV's Board is different than TBN's when he described the Board's discussion of local programming for Portland:

"I wanted to be able to get some things that would inform people about gangs, the Bloods, the Crips,

about violence, culture of minorities, what they thought, things like that. The reason I was stronger about it is I'm aware of it, and Paul just was more ignorant of it because that wasn't his background." (§130 above; emphasis added.)

It was Pastor Hill who, based on his knowledge of government programs to encourage joint ventures between the majority private sector and minorities and the ultimate objective for the minority entity to separate from that relationship, initiated the proposal for NMTV to adopt a formal program to repay its indebtedness to TBN. (§§154, 155, 166 above.) Pastors Hill and Aguilar were the Directors who promoted the proposal that a minority attorney be retained to review from a minority perspective the allegations that had been made against NMTV (§§130, 160 above), a concept which Dr. Crouch or TBN are extremely unlikely ever to have initiated themselves. It was Pastor Hill who recommended a minority leader to serve on NMTV's Minority Advisory Committee in Portland, and three minorities -- Pastor Aguilar, Mrs. Duff, and Pastor Hill -- were the ones who comprised the majority when NMTV's Board discussed that Committee and NMTV's minority hiring, training, and programming. (§§139, 162, 182, 188 above.)

645. The law is well settled that the minority ownership policy requires "no ironclad guarantee that each minority owner will contribute to diversity." Metro Broadcasting v. FCC, 497 U.S. 547, 579 (1990). Rather, the policy is based on a predictive judgment that "A broadcasting industry with representative



minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group." Id. Clearly, "representative minority participation" cannot lawfully be construed to exclude participation by minorities who are Christian and wish to spread the gospel. (¶¶673-80 below.) Nor can the government lawfully make a determination that gospel programming is not a service to the minority community, especially when it clearly is. (¶¶90, 177 above; ¶¶678-79 below.) What is important under the policy "is not a rigid assumption about how minority owners will behave in every case," but the goal "that greater admission of minorities would contribute, on average, to the robust exchange of ideas." Id. Thus, while NMTV in the few years it has been broadcasting has in fact initiated commendable efforts to provide minority-oriented programming, training, and hiring, what is important under the policy is that minorities have the opportunity to provide their input whatever it may be. In this regard, the Commission has never quantified a specific amount of participation to be required of noncommercial Board members. Indeed, acknowledging its own uncertainty, the Commission has asked for public comment on "the manner in which organizations with self-perpetuating Boards operate." Transfer of Control of Certain Licensed Non-Stock Entities, supra, 4 FCC Rcd at 3407. Yet, despite the lack of specific Commission standards, and though like all such bodies NMTV's Board could have functioned better, the record clearly shows that NMTV's Board members have

had the real opportunity to participate and provide diverse input on those areas of corporate policy in which they want to participate.<sup>101/</sup>

646. In the end, this issue boils down to the single question of whether Mrs. Duff serves on the NMTV Board individually or as an agent of Dr. Crouch or TBN. There is no question that minorities, including Mrs. Duff, have always controlled a majority of the votes on NMTV's Board. There is no question that Mrs. Duff, who is minority, is the NMTV Board

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<sup>101/</sup> Since the Commission has not adopted clear standards based on a record demonstrating the objective relationship of such standards to the public interest, the ad hoc application of a new standard in this case would be arbitrary and unlawful. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993); 5 U.S.C. §§558(c), 706. While standards must be established in proceedings of general applicability which regulate conduct prospectively after clear and timely notice (e.g., Transfers of Control of Certain Licensed Non-Stock Entities, supra; Reexamination of the Policy Statement on Comparative Broadcast Hearings, 9 FCC Rcd 2821 (1994)), it should be noted that it would be extremely unwise to create a standard that precluded outstanding minority leaders such as Pastors Hill, Ramirez, Espinoza, and Aguilar from participating on the Boards of broadcast licensees. In this respect, while Pastor Hill's contribution to NMTV of ten hours a year may initially appear small, Pastor Hill brings to those hours a lifetime of experience and insights, and thousands of hours spent yearly in virtually everything he does, filled with information about those services which the minority community truly needs. The input that a person of his background and community activity brings to NMTV cannot be duplicated. For example, it was Pastor Hill's experience with the Private Sector Initiative that provided the impetus for NMTV to formulate the specific program to satisfy its debt to TBN and thereby move toward separating the joint venture. (¶¶154, 155, 166 above.) Moreover, while this issue is more properly addressed in a proceeding of general applicability, the level of Dr. Hill's participation in NMTV is not unusual for Directors of nonprofit corporations, and to adopt a policy holding that such participation is insufficient would both foreclose participation by scores of valuable contributors and disqualify many Directors of nonprofit corporations that already hold licenses today.

member who has been responsible for the supervision of NMTV's day-to-day activities. NMTV thus is clearly a minority controlled and operated company, unless Mrs. Duff sits on its Board as an agent of someone else who is not minority. In Spanish International Television Co., Inc., supra, the Commission addressed and rejected a similar allegation that the owner of a network improperly controlled a licensee because two of his employees who were also owners of the licensee were "beholden" to him as employees. 5 RR 2d at 6. The Commission dismissed that allegation as "unsupported speculation." Here, the allegation is less than unsupported speculation. It is affirmatively disproved.

647. Simply put, if Mrs. Duff were Dr. Crouch or TBN's agent on NMTV's Board, she would have done Dr. Crouch's bidding and not impeded him on the important matters that she did. She would have joined him in getting the Houston low power station built and would not have sold the permit against his wishes. She would have joined him in causing NMTV to sell the Odessa construction permit and not voted to build that station against his wishes. She would have joined him immediately when he wanted to try to sell the station after it was built, and would not have delayed for months while she tried to disprove his assessment that the station could not obtain cable carriage. She would compliantly have followed his position and would never have voted to spend \$100,000 more than his limit to buy the Portland studio, but she did. Moreover, if Mrs. Duff were Dr.

Crouch or TBN's agent, she would not have inserted into NMTV's Affiliation Agreements provisions that are not typically included in TBN's agreements with other affiliates and which give NMTV greater rights to terminate its relationship with TBN or to broadcast the programming of competing religious networks. (§§179, 180 above.) If she were Dr. Crouch or TBN's agent, she would have accepted without protest the fee that TBN wanted to charge for providing NMTV with business services, and not urged that the fee be cut in half. (§204 above.) Furthermore, if Dr. Crouch thought that Mrs. Duff was his agent and subject to his control, the special protections that he labored to have included in the Bylaws of TBN and its affiliates to protect him from removal would have been superfluous. At the time Dr. Crouch sought those protections, TBN's Board consisted of himself, Mrs. Duff, and Mr. Juggert. (§36 above.) If Dr. Crouch believed that Mrs. Duff was his agent and subject to his control, he already controlled a majority of the Board and was safe from removal under the existing provision. However, he required the special removal provision precisely because Mrs. Duff is not someone he controls, as her actions for NMTV confirm. The record does not establish that Mrs. Duff serves on NMTV's Board as an agent of Dr. Crouch or TBN.

648. In reality, Mrs. Duff's participation on NMTV's Board represents a remarkable success for the Commission's minority ownership policies. Fifteen years ago she was an intelligent and capable minority who, like so many in that category, was

locked outside the broadcast industry. Because of the Commission's policies she is today an experienced broadcaster who is responsible for her own company that is providing exemplary service to the minority community. This did not happen overnight. It happened because, as a result of the Commission's policies, TBN first gave Mrs. Duff employment and a chance to sit on the Board of a television company, albeit one that is not minority controlled. Due to the Commission's policies, she then received the opportunity to be a Director of a company that is minority controlled.<sup>102/</sup> Over the years, Mrs. Duff gained more experience which prepared her to become the chief executive of her own company. If during that time Commission policy had required her to resign her employment at TBN, which it did not (§640 above), she would have completely lost the opportunity to develop that experience. Over the years, and with the management and technical expertise that TBN has provided pursuant to the policy incentive the Commission created (§§590-600 above), her experience has grown so that she is now able to provide to

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<sup>102/</sup> The fact that NMTV's Board of Directors has included minorities with whom Dr. Crouch is familiar raises no legitimate questions whatsoever. Indeed, what the Commission consistently has found suspicious are situations in which parties have committed substantial funds to total strangers who purportedly head up companies in which the financing parties have disingenuously claimed to be totally passive. See, e.g., Intermart Broadcasting Gulf Coast, Inc., 8 FCC Rcd 2937, 2940 (Rev. Bd. 1993) referring to the prototypical incredible situation in which individuals "with little or no broadcast experience, are entrusted with one hundred percent control of the proposed stations by limited partners who barely knew them or their qualifications," citing Poughkeepsie Broadcasting Limited, 6 FCC Rcd 2497, 2498 (1991); Metroplex Communications, Inc., 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), modified, 5 FCC Rcd 5610 (1990).

NMTV managerial functions that materially exceed her duties at TBN. Specifically, NMTV's Station Managers have reported to Jane Duff, a minority; TBN's have not. (§63 above.) NMTV's Station Managers and Chief Engineers have been hired by Jane Duff, a minority; TBN's have not. (Id.) For NMTV, Mrs. Duff, a minority, has hired or supervised the hiring of station staff; for TBN she has not. (Id.) For NMTV, Mrs. Duff, a minority, regularly reviews the company's expenditures and is responsible for generating the majority of those expenditures herself; for TBN she does not. (Id.) For NMTV Mrs. Duff has negotiated leases, and studio and land purchases, and has performed a list of responsibilities which she does not have at TBN. (Id.) The difference between her status as an owner of NMTV and an employee of TBN is clearly reflected in her unwavering commitment to the survival of the property that she and NMTV were "responsible for birthing" (§§41, 46, 77, 166, n. 33 above); her directions and supervision that have resulted in minority programming, outreach, training, and hiring at NMTV's operation (§§80-81 above); and her readiness to vote down Dr. Crouch when she felt his positions would hurt her company. (§643 above.) In short, the suggestion that Mrs. Duff is not an individual minority member of NMTV's Board is utterly untrue. NMTV's Board of Directors is in fact controlled by minorities, and NMTV is in fact a minority-owned company.

(5) Summary

649. There is no dispute that TBN has had influence in the affairs of NMTV. Indeed, the Commission's expansion of the multiple ownership rules to encourage joint ventures between the majority and minority sectors was designed to invite established broadcasters to have such influence -- to provide financing on the most favorable terms possible, to participate significantly as officers and Directors, to develop the properties, and to lend substantial management and technical expertise. Such influence is not the same as control. News International, PLC, ¶603 supra; Telephone and Data Systems, Inc. v. FCC, ¶603 supra. Though TBN has had influence which has helped enable NMTV to provide the service it now provides, TBN has never had the right to determine -- and has never purported to determine -- NMTV's basic operating policies. Control over programming, personnel, finances, and Board decisions remains, and has always remained, with the individual members of NMTV's Board, the majority of whom are minorities. In these circumstances, no de facto control violation has occurred. A contrary decision in this case would send a signal to established broadcasters that they jeopardize their licenses if they provide minority entities financing and other kinds of assistance to fulfill the Commission's minority ownership policies. That would kill the minority ownership policy altogether; no established broadcaster would dare take the chance. Since TBN has never had the right

to control NMTV, there has been no violation of Section 310(d), and TBF remains fully qualified to hold the license of WHFT(TV).

**b. Even if a Violation of Section 310(d)  
Had Occurred, Neither Disqualification  
Nor the Imposition of any Significant  
Penalty Would Be Warranted**

650. Even assuming, arguendo, that TBN exercised de facto control over NMTV -- which the evidence establishes it did not -- neither disqualification nor the imposition of any significant sanction is warranted. The Commission has firmly held that an unauthorized transfer of de facto control will not compel the revocation of a broadcast license unless the transfer was accompanied by a deliberate effort to conceal it through deception, misrepresentation, or lack of candor. Silver Star Communications of Albany, Inc., 6 FCC Rcd 6905 (1991); Deer Lodge Broadcasting, Inc., 86 FCC 2d 1066 (1981); Blue Ribbon Broadcasting, Inc., 90 FCC 2d 1023 (Rev. Bd. 1982); George E. Cameron Jr. Communications (KROQ), 56 RR 2d 825 (1984). The core element of misrepresentation or lack of candor is "willful intent to deceive." Fox River Broadcasting, Inc., 88 FCC 2d 1136, 1137 (Rev. Bd. 1982), modified, 93 FCC 2d 127 (1983). As demonstrated below, the record shows that neither TBN, NMTV, nor their principals willfully intended deceive the Commission concerning the relationship between the two corporations.

651. Initially, in assessing the parties' intent it must be recognized that the Communications Act "does not contain any



definition of the term 'control' or the phrase 'transfer of control,' nor does it contain any formula by which 'control' may be determined." Transfers of Control of Certain Licensed Non-Stock Entities, supra, 4 FCC Rcd at 3403. Thus, to fulfill its mandate under Section 310(d) the Commission has developed certain guidelines for determining when a transfer of control has occurred. However, as the United States Court of Appeals has observed, "[d]etermining issues of control ... is a complex task which must be done on a case-by-case basis." Storer Communications Inc. v. FCC, 763 F.2d 436, 442 (D.C. Cir. 1985).

652. The concept of de facto control is even more complex, and is particularly "suffused with illusiveness and subjectivity." Spanish International Communications Corp., 1 FCC Rcd 92, 93 (¶6) (Rev. Bd. 1986); Blue Ribbon, supra, 90 FCC 2d at 1025 ("[d]e facto control is necessarily a complex concept which arises out of the totality of the circumstances"). Thus, the Commission has recognized that questions of de facto control are not readily amenable to resolution through the application of hard and fast rules because "corporate control varies from company to company, and each case may present unique complexities." Non-Stock Entities, supra, 4 FCC Rcd at 3403 (¶5). For this reason, the Commission has declined to adopt "rigid guidelines for assessing de facto control, because each case will turn to a large degree on its own unique factual circumstances." Id. at 3404 (¶9.) Consequently, the Commission itself has not always applied its de facto guidelines evenly and

with precision. See, Telephone and Data Systems, Inc. v. FCC, supra, 19 F.3d at 658 (remanding for further proceedings in view of the Commission's uneven application of its de facto control criteria); Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42, 50 (D.C. Cir. 1994) (vacating Commission order and remanding for further proceedings in view of the Commission's arbitrary application of its de facto control criteria).<sup>103/</sup>

653. Here, the issue of control was exceptionally more complex than usual given the unique legal and factual circumstances under which the relationship between TBN and NMTV developed. Specifically, as discussed at ¶¶590-600 above, it is clear that the minority ownership policy under which NMTV acquired the Odessa and Portland stations was intended by the Commission to encourage experienced group owners like TBN to become involved in the development of minority enterprises like NMTV by providing them with substantial managerial, technical, and financial assistance and exercising significant influence through the maintenance of cognizable interests. Yet at the same time neither that policy nor the Commission's Rules provided any clear guidance concerning the extent to which the group owner could permissibly provide such assistance without implicating the Commission's de facto control guidelines.

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<sup>103/</sup> Although the TDS cases arose in the context of cellular licensing proceedings, the Commission employed an amalgam of FCC precedents involving cellular and broadcasting facilities when making its determination as to whether de facto control had been transferred.

654. Compounding the situation's complexity was the fact that both entities are nonprofit, nonstock corporations which are not "owned" in the traditional sense. Rather, they are each governed by self-perpetuating Boards that function as "owners" and direct their respective operations. Although the Commission has established substantive and procedural guidelines for determining when transfers of control of traditional stock corporations have occurred, it has acknowledged that

"we presently lack a comparably articulated Commission policy for determining when a transfer of control of a non-stock entity has occurred. The lack of such a policy has created a degree of uncertainty among our licensees, and on several occasions has unnecessarily exposed various non-stock entities to attack." Non-Stock Entities, supra, 4 FCC Rcd at 3403 (¶1).

To address this concern, the Commission has initiated a proceeding, which remains pending, to solicit comments on how its control policies should apply in the context of non-stock corporations like TBN and NMTV. Id. However that inquiry was not launched until after NMTV's application for the Portland construction permit had already been granted.<sup>104/</sup>

655. Finally, the situation was even more complex because TBN and NMTV are both nonprofit religious organizations that operate within a community where it is common for larger

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<sup>104/</sup> Although as part of its inquiry the Commission has suggested that it would be appropriate to use its traditional de facto control criteria in ascertaining where "actual" control resides in a non-stock entity, that proposal has not yet been adopted and it remains pending. Non-Stock Entities, supra, 4 FCC Rcd at 3410 n. 28.

sponsoring churches to foster the development of their newly established brethren through the provision of start-up capital and other forms of assistance. (§§205-207 above.)

656. Thus, given the complexity of the de facto control concept at issue, the Commission's pronounced desire for established group owners like TBN to provide substantial assistance to minority entities like NMTV, the lack of clear guidance sufficient to apprise a group owner of how much assistance could be provided without implicating the Commission's de facto control guidelines, the absence of articulated de facto control standards applicable to nonprofit, nonstock corporations, and the parties' common experience in the world of nonprofit religious organizations where benign relationships are customary between sponsoring churches and their smaller brethren, elementary fairness dictates against a finding of intentional deception. See, e.g., A.V. Bamford v. FCC, 535 F.2d 78, 82 (D.C. Cir. 1976) ("It is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected").

657. Moreover, counsel's role in this matter must also be considered when assessing the parties' intent. In view of the complex legal and factual circumstances discussed above, it was entirely reasonable and proper for TBN and NMTV to seek and rely

on the advice and guidance of expert FCC counsel to ensure that they would remain in compliance with FCC requirements. In this regard, the record establishes that Mr. May was aware throughout the parties' relationship of the various forms of assistance that TBN was providing to NMTV. (§§227, 258 above.) However, he never advised NMTV, TBN, Mrs. Duff, or Dr. Crouch that the relationship among them violated any Commission rule or policy. (§§227-228, 258 above.) To the contrary, Mr. May believed and so advised Dr. Crouch and Mrs. Duff that the Commission was expressly encouraging group owners and/or their principals to become actively involved in minority owned companies and to provide such companies with substantial assistance to help ensure their success. (§§228, 234, 235, 254 above.)

658. The record shows that Mr. May's advice was premised in part upon his reading of the Commission's Memorandum Opinion and Order revising the multiple ownership rules and his reading of Rule 73.3555(d), both of which provided that group owners could hold a "cognizable interest" in up to fourteen stations in the same service so long as two of those stations were "minority controlled." (§§229-232 above.) Moreover, the Memorandum Opinion and Order provided, in pertinent part, that

"A question arises as to the proper definition of a minority owned station for the purposes of our multiple ownership rules.... In the context of the multiple ownership policies, we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard for permitting increases to the rules adopted herein." 100 FCC 2d at 95 (§46).

Similarly, Rule 73.3555(d) defined the phrase "minority controlled" as meaning "more than 50 percent owned by one or more members of a minority group." Accordingly, Mr. May advised Dr. Crouch and Mrs. Duff that NMTV qualified for the minority exception under the multiple ownership rules and that it was appropriate for TBN to provide NMTV with a substantial degree of technical and financial assistance to help NMTV to succeed. (§§29, 228, 231, 233-35 above.) His advice was also based on his knowledge and experience counseling nonprofit, nonstock organizations that Directors are treated by the Commission as "owners" and that the Directors are the sole locus of control. (§§230-232 above.) The record establishes that this advice was consistent with the parties' own understanding that the Directors of nonprofit, nonstock corporations are the "owners." (§§243, 245 above.) In view of his understanding, Mr. May never considered that NMTV's various ties to TBN implicated the Commission's de facto control policy. (§233 above.)

659. Although Mr. May acknowledged under examination that the Commission has now very much disagreed with his interpretation of the Rules, he related that this was the advice he gave and that "people acted on it and that's why we're here today and literally millions of dollars and hundreds of people's lives have been impacted as a result of what I did." (§233 above.) But the record shows that Mr. May's advice concerning the Commission's test for minority control was far more temperate

than the interpretation that even Commissioner Patrick had given to the policy. Thus, Commissioner Patrick had concluded that:

"Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity. No concern is given to whether the 51% minority owners will exert any influence on the station's programming or will have any control at all." 100 FCC 2d at 104 (emphasis added).

Mr. May, in contrast, testified that he understood the policy and the rules to require at least that the Directors be "real" as evidenced by their involvement generally in directing the affairs and policies of the corporation. (§242 above.)

660. Regardless of whether or not Mr. May's perception of the Commission's minority ownership policy was correct, it is apparent that he genuinely believed that the advice he was giving was proper, and, particularly in view of Commissioner Patrick's contemporaneous description of the policy at the time it was adopted, he has advanced a credible argument to support that belief. In other cases that have involved vague policies and complicated legal concepts, the Commission has found that an applicant's honest belief in the propriety of its conduct, even if that conduct is shown in retrospect to have violated Commission policy, is sufficient to negate a finding of deceptive intent. See, Fox Television Stations, Inc., supra, 8 FCC Rcd at 2401-03 (§§49-51) (licensee's honest belief that the dual roles of its employee did not violate the Commission's vague cross-

interest policy negated any intent to deceive), recon. denied, 8 FCC Rcd 3583 (1993); review granted in part, denied in part, 9 FCC Rcd 62 (1993); see also, Rainbow Broadcasting Company, 9 FCC Rcd 2839, 2843 (¶22) (1994) (violation of the Commission's complex ex parte rules did not merit disqualification where applicant's counsel manifested a sincere belief that illegal contacts were proper and advanced a "plausible argument" in support of that belief). Considering the complex legal and factual circumstances that existed at the time Mr. May rendered his advice, no different conclusion is warranted here. See, Christian Broadcasting of the Midlands, Inc., 2 FCC Rcd 6404, 6405 (¶13) (1987) (lack of deceptive intent found where applicant advanced several arguments to justify its conduct and one of them was deemed meritorious); High Country Communications, 4 FCC Rcd 6237, 6238 (¶9) (1989) (finding of misrepresentation not warranted in the absence of evidence that the applicant "knew his interpretation of the rule was incorrect or that he intended to deceive the Commission in adopting an interpretation" different from what the rule provided).

661. Additionally, the record plainly establishes that Mr. May's advice served as the predicate for the parties' subsequent actions, and there is no evidence that they doubted his advice or that they knew or had reason to know that their relationship implicated the Commission's complex de facto control guidelines. In other cases, the Commission has found good faith reliance on the advice of counsel to be a mitigating factor, particularly



where the applicant did not know or acquiesce in counsel's error. See, Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5113 (¶12) (Rev. Bd. 1993) (misstatements did not merit disqualification where counsel had initiated the filing and accepted full responsibility for its errors); WEBR, Inc. v. FCC, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel relevant to whether applicant proceeded with candor). Given the particularly complex nature of the Commission's rules and policies in the circumstances presented here, the parties' good faith reliance on counsel militates against a finding of willful deception.

662. Likewise, although the record establishes that both the Odessa and Portland applications contained a number of errors (¶263 above), it is evident that those mistakes were the result of carelessness rather than a willful intent to deceive. As the Commission has long recognized --

"[c]onduct which may be characterized as 'carelessness ... and exaggeration, puffing and slipshoddiness' ... falls short of the degree of scienter historically required by the Commission for disqualifying consequences." Fox River, supra, 88 FCC 2d at 1137 (¶8) (citations omitted).

Thus, inadvertence, carelessness, and mistakes of law and fact must be distinguished from a deliberate intent to deceive. Kaye-Smith Enterprises, 71 FCC 2d 1402, 1415 (1979) ("bare existence of a mistake" in an application "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepre-